



# Questions and Answers

## USCIS Field Operations Directorate – American Immigration Lawyers Association (AILA) Meeting

October 25, 2011

### Overview

On October 25, 2011, the USCIS Field Operations Directorate hosted an engagement with AILA representatives. USCIS discussed issues related to operations and adjudications. The information below provides a review of the questions solicited by AILA and the responses provided by USCIS.

### Questions & Answers

#### Adjustment of Status for Alien Immediate Relatives Admitted Under the Visa Waiver Program

1. AILA appreciates the [guidance issued to field offices](#) on the policy regarding procedures for adjustment of status for Visa Waiver Program (VWP) applicants (AILA Doc. No. 11040735).<sup>1</sup> However, members continue to report inconsistencies in the treatment of these cases. AILA requests that USCIS remind the field that immediate relatives admitted on a visa waiver are eligible to adjust and to release that guidance to the public, so that AILA members and stakeholders in general can address issues that may arise in field offices that are not adjudicating applications in a manner that is consistent with the guidance.

**USCIS Response:** All field offices have been instructed to adjudicate I-485 applications filed by immediate relatives who last entered the U.S. under the Visa Waiver Program (VWP) and overstayed on their merits UNLESS the potential beneficiary is the subject of an INA section 217 removal order. Additionally, field offices have been instructed to hold in abeyance all VWP adjustment applications for applicants who have been ordered removed under INA section 217. USCIS is in the process of drafting final guidance including an AFM update on this topic.

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<sup>1</sup> AILA Liaison/USCIS Meetings Q&A, Question 4, AILA Doc. No. 11040735, <http://www.aila.org/content/default.aspx?docid=35068>, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8d28b46bf313f210VgnVCM100000082ca60aRCRD&vgnnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD>

## I-551 Stamps

2. AILA members have reported that USCIS field offices are issuing temporary I-551 extensions for varying validity periods (such as three, six, or twelve months) when the I-751 or I-829 is pending or when there has been a denial and a Notice to Appear has not yet been issued. According to the regulations, an automatic extension of status is authorized upon the filing of either form I-829 or I-751.<sup>2</sup> Additionally, the regulations state that conditional residence shall be automatically extended until the director adjudicates the petition (AILA Doc. No. 03120940).<sup>3</sup> The Service has also recognized that a conditional permanent resident whose status has been terminated retains temporary status during the pendency of review in removal proceedings.<sup>4</sup> This position was reaffirmed in an April 10, 2003 memorandum from William Yates (AILA Doc. No. 03050643),<sup>5</sup> and at the AILA/USCIS Field Operations liaison meeting on January 7, 2011. (AILA Doc. No. 11021031).<sup>6</sup> What guidance has been provided to field offices with regard to the issuance and validity periods of temporary extensions of I-551 stamps under the following scenarios:

- a. When the I-751 or I-829 is pending with USCIS for more than one year?

**USCIS Response:** Pub. L. 107-273 mandates up to two additional reviews of covered EB-5 cases. As a result, USCIS must continue to document the conditional resident status of eligible aliens with pending or denied Form I-829s until the conditional status has been removed or a final order of removal has been issued under section 242(a)(1) of the Act. The following information should be considered when adjudicating the extension of conditional resident status for eligible aliens under Pub. L. 107-273.

If the Form I-829 is pending or it has been denied but no final order of removal has been entered, the ISO must collect the expired conditional Permanent Resident Card and issue either:

- A temporary I-551 stamp with a 12-month expiration date in the petitioner's unexpired, foreign passport (if the expiration date of the passport is one year or more), or
- If the petitioner is not in possession of an unexpired foreign passport, a Form I-94 (arrival portion) containing a temporary I-551 stamp with a 12-month expiration date

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<sup>2</sup> 8 CFR §§216.4(a)(1), 216.6(a)(1).

<sup>3</sup> *Id.* See also, *USCIS Issues Memorandum on Documentation of Extension of Conditional Resident Status*, AILA Doc. No. 03120940, <http://www.aila.org/content/default.aspx?docid=9734>

<sup>4</sup> Memorandum of Kathy A. Redman, Acting Ass't Comm'r for Adjudications, "Status of Conditional Residents in Proceedings," (Oct. 9, 1997). See also, "Status of a Conditional Permanent Resident After Denial of I-751 During Pendency of Review by EOIR," 96 Op. Gen. Counsel 12 (Aug. 6, 1996).

<sup>5</sup> *BCIS Memo Discusses Waiver of the Joint Filing Requirement Prior to Final Termination of Marriage*, AILA Doc. No. 03050643, <http://www.aila.org/content/default.aspx?docid=8678>.

<sup>6</sup> *AILA/USCIS Field Operations Liaison Meeting Q&A*, Question 10, AILA Doc. No. 11021031, <http://www.aila.org/content/default.aspx?docid=34452>, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=ae20321b0211e210VgnVCM100000082ca60aRCRD&vgnnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD>

and a photograph of the petitioner. [NOTE: USCIS may require petitioner to obtain unexpired passport, if available, prior to issuing temporary I-551 stamp.]

The ISO must use the same conditional resident status code initially issued to the petitioner and grant the status for an additional 12 months. Documentation of conditional resident status must be issued until a final order of removal is issued. An order of removal is final if a decision is not appealed or, if appealed, when the appeal is dismissed by the Board of Immigration Appeals (BIA).

In the case of a Form I-751, the regulations at 8 CFR 216.4(a)(1) state that, “Upon receipt of a properly filed Form I-751, the alien’s conditional permanent resident status shall be extended automatically, if necessary, until such time as the director has adjudicated the petition.” Thus, any conditional resident who has properly filed a Form I-751 remains a conditional resident until a decision is made on his or her Form I-751. Such conditional resident is eligible to receive evidence of his or her conditional resident status. If the Form I-751 is still pending one year after filing, the ISO should collect the expired Form I-551 and issue a temporary I-551 stamp with a 12-month expiration date in the conditional resident’s unexpired, foreign passport (if the expiration date of the passport is one year or more). If the conditional resident is not in possession of an unexpired foreign passport, the ISO should instead issue a Form I-94 (arrival portion) containing a temporary I-551 stamp with a 12-month expiration date and a photograph of the conditional resident.

Guidance regarding periods of temporary I-551 stamps for Form I-829 can be found in Chapter 25.2 of the Adjudicator’s Field Manual. Guidance regarding temporary I-551 stamps issued to conditional residents with a pending Form I-751 can be found in the Yates memorandum entitled, “Extension of Status for Conditional Residents with Pending Forms I-751, Petition to Remove Conditions on Residence,” dated December 2, 2003.

b. When the I-751 or I-829 has been denied by USCIS but an NTA has not been issued?

**USCIS Response:** USCIS will issue NTAs after a case has been denied where an NTA is prescribed by regulation. This includes, but is not limited to Form I-751 Petition to Remove Conditions on Residence and Form I-829, Petition by Entrepreneur to Remove Conditions. *See* 8 CFR §216.4(d)(2) 8 CFR §216.6(d). The alien is eligible for temporary I-551 stamps until an Immigration Judge makes a final decision on the case.

c. When the I-751 or I-829 has been denied by USCIS, an NTA has been issued, and the I-751 has been renewed in immigration court?

**USCIS Response:** If the I-829 or I-751 has been denied and an NTA has been issued, but no final order of removal has been entered, then USCIS should follow established procedures for providing a temporary I-551 stamp as evidence of the alien’s conditional resident status upon request at a local USCIS Field Office. The alien is eligible for temporary I-551 stamps until an Immigration Judge makes a final decision on the case.

- d. How far in advance of the expiration of an I-751 or I-829 receipt notice granting a one-year automatic extension of conditional residence can an applicant make a request for a temporary I-551 stamp and any future I-551 extensions?

**USCIS Response:** USCIS will issue a temporary I-551 stamp up to 90-days before the expiration of the extension of conditional residence provided in the receipt notice; however, if the applicant has a hearing before the Immigration Judge within that timeframe, USCIS may request that the applicant wait until the after the hearing before issuing the temporary I-551 stamp.

### **Biometrics & Fingerprinting**

3. We understand that there are different codes for submission of biometrics, such as:

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|---------|---|
| Code 1: | Fingerprints only (10 prints)   |
| Code 2: | Biometrics (photo, index fingerprint, and signature)                              |
| Code 3: | Fingerprints (10 prints) and biometrics (photo, index fingerprint, and signature) |

We understand that codes are assigned depending on the application type and or applicant category. For example, an I-485 applicant 14 or older receives a Code 3, and an applicant under 14 receives Code 1. Would the Service provide a complete list of the applications and/or applicant categories that correspond with each code?

**USCIS Response:** USCIS requires applicants for most immigration benefits to report to an Application Support Center (ASC) for the purposes of biometrics capture. There are a multitude of factors that are considered when determining which code to use when capturing biometrics. The code used will vary depending on those factors.

4. The USCIS website states that fingerprints never “expire” but the validity period of background check and clearance based on fingerprint collection is 15 months. During a [February 20, 2008 teleconference with SCOPS](#), USCIS stated that as of July 2007, biometrics are stored under a new system that will allow fingerprints to be “refreshed” in the future which would result in the elimination of the need for rescheduling in most cases (AILA Doc. No. 08022770).<sup>7</sup>

- a. What is current USCIS policy on whether and when fingerprints and/or biometrics must be retaken?

**USCIS Response:** Biometrics must be taken in accordance with the filing instructions of the form/application associated with the requested benefit. USCIS may reuse biometrics in certain cases.

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<sup>7</sup> AILA Liaison/SCOPS Q&A (2/20/08), AILA Doc. No. 08022770, <http://www.aila.org/content/default.aspx?docid=24775>

- b. In what situations does USCIS consider fingerprints and/or biometrics transferable across applications?

**USCIS Response:** USCIS will routinely transfer biometrics across applications for military service members and their families who have unique situations regarding deployment, moving, and living overseas which affect their ability to provide fingerprints and fulfill the background check requirements. This authority is provided by the Kendell Frederick Citizenship Assistance Act, enacted on June 26, 2008, requires USCIS to use fingerprints taken for previous immigration purposes or fingerprints provided during military enlistment to complete the required naturalization fingerprint check.

- c. In what situations does USCIS consider fingerprints and/or biometrics optional? For example, employment authorization cards are sometimes issued stating “fingerprint unavailable.” Can you explain this notation?

**USCIS Response:** The collection of biometrics is not optional with very limited waivers related to medical conditions.

## **Removal Proceedings**

5. Confusion exists among field offices as to the proper procedure through which to request fingerprint scheduling for persons who are seeking relief in immigration court. What is the procedure for requesting new fingerprints for individuals in removal proceedings where fingerprints have expired?

**USCIS Response:** Please see [Fact Sheet on Immigration Benefits in EOIR Proceedings](#), last updated on August 22, 2011.

## **Reentry Permits**

6. In introducing the biometrics requirement for reentry permits, USCIS indicated that it would [prioritize requests](#) for expedited issuance of receipt notices and biometrics notices for applicants with imminent travel plans (AILA Doc. No. 08070963).<sup>8</sup> In light of the time-sensitive nature of such cases, some field offices and Application Support Centers (ASCs) allow for the collection of biometrics based on the I-797 receipt notice prior to departure from the U.S. For example, one field office may accept an InfoPass appointment for the purpose of generating an ASC appointment notice, while other offices have no system for accommodating such requests.

Please advise if USCIS has issued national guidance to field offices/ASCs on the treatment of requests for expedited biometrics collection in the context of reentry permit applications.

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<sup>8</sup> USCIS Q&As on Biometric Changes for Re-Entry Permits and Refugee Travel Documents, AILA Doc. No. 08070963, <http://www.aila.org/content/default.aspx?docid=25908>

**USCIS Response:** Applicants requesting an expedite must include a pre-paid express mailer with their filing. NSC will use the mailer to rush-deliver the ASC notice to the applicant. The applicant must also mark the envelope that contains the I-131 filing with the word “Expedite.” The instructions also encourage the inclusion of a second pre-paid express mailer, which NSC will use to rush-deliver the reentry permit or refugee travel document. If the applicant has not received an ASC appointment notice from the NSC in time to capture biometrics prior to travel the applicant may make an InfoPass appointment to request expedited biometric capture. Applicants should bring a copy of their I-797 receipt notice to the InfoPass appoint.

### **Motions to Reopen or Reconsider**

7. Who is responsible for reviewing a motion to reopen or reconsider? If the original adjudications officer (AO) reviews the motion, is the AO’s decision to affirm or reverse the original decision reviewed by a supervisor before a final decision is issued?

**USCIS Response:** A motion to reopen or a motion to reconsider a decision will be reviewed to determine if the request meets the requirements of 8 CFR §103.5. Generally, a motion is adjudicated by the same officer who made the original decision. It is standard procedure for the motion to be considered by the same office (district, service center, immigration court, AAO, or BIA) that made the decision. . Decisions to affirm the original decision will be reviewed by a supervisor.

8. AILA understands that USCIS has offered no directive to field offices on an appropriate time frame for adjudicating motions to reopen/reconsider. Would USCIS consider national guidance to assist field offices in setting an appropriate timeframe and adjudication goals for such motions?

**USCIS Response:** Motions to reopen/reconsider are processed in the order in which they are received. Because of limitations with USCIS’ systems, the processing time for Form I-290B is not broken down by category (i.e., appeals, motions to reopen, and motions to reconsider). The actual time it takes for motions to be resolved will vary. If has motion has been pending for more than 90 days, USCIS has updated its customer call scripts so that service requests can be made with the National Customer Service Center at 1-800-375-5283.

### **Widow(er) Petitions and Motions to Reopen**

9. Per the [December 16, 2010 USCIS policy memorandum](#),<sup>9</sup> we understand that (AILA Doc. No. 11011061):

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<sup>9</sup> *USCIS Memo on the Approval of Petitions and Applications after the Death of the Qualifying Relative*, AILA Doc. No. 11011061. <http://www.aila.org/content/default.aspx?docid=34098>

- a. For cases denied before October 28, 2009, an alien may file an untimely motion to reopen a petition, adjustment application, or waiver application, if new INA §204(l) would now allow approval of a petition or application.

- i. For these cases, are field offices instructed to issue receipt notices for I-290B filings immediately upon receipt, and make the decision to reopen the case within a set period of time?

**USCIS Response:** Forms I-290B, Notice of Appeal or Motion, are filed with the Lockbox. The Lockbox will issue a receipt notice upon acceptance of the filing. Please see the response above regarding processing time.

- ii. Are the reopened cases subject to the same processing times as other I-485 filings?

**USCIS Response:** Yes, reopened cases will be subject to the same processing times as other I-485 applications.

- b. If a petition or application was denied on or after October 28, 2009, and §204(l) would have permitted approval, USCIS must reopen the case on its own motion.

- i. What is the procedure for bringing a case that requires reopening on the Service's own motion to the attention of USCIS? Are field offices instructed that a simple letter requesting reopening is sufficient?

**USCIS Response:** A written request is sufficient, provided that the request is accompanied by documentary evidence such as a death certificate, evidence of continuous residence in the U.S., and evidence of a relationship with the qualifying relative.

- ii. Does the applicant receive an acknowledgement letter or other receipt indicating the reopening request will be reviewed?

**USCIS Response:** USCIS will provide notice if/when a case has been reopened.

- c. Upon the death of the citizen petitioner, the I-130 filed by a U.S. citizen on behalf of his/her spouse is converted to a widow(er)'s Form I-360.

- i. In these cases, are field offices aware that the conversion is automatic and that no further action is required on an approved I-130 that is converted?

**USCIS Response:** Yes. Guidance on this topic is provided in Chapter 10.21 of the Adjudicator's Field Manual.

- d. In motion to reopen cases, are field offices aware that the petition may have been approved at the time of death of the petitioner or later denied, and that such petitions are eligible under §204(l)? Please see the attached notice of decision in which the field office was clearly

unaware that approved petitions should be treated the same as pending petitions. Such treatment does not comport with the statute. Will USCIS please issue guidance to the field to clarify that there is no distinction between pending and approved petitions, as was suggested by AILA in its [comments to the Draft Memorandum](#) (AILA Doc. No. 10060363)?<sup>10</sup>

**USCIS Response:** USCIS will not issue this guidance, because there is an important distinction between pending and approved petitions.

An officer has authority, as a matter of discretion, to approve an adjustment of status application that was pending when the qualifying relative died (or even one filed after the relative died), if the related visa petition is approved, as a matter of discretion, under section 204(l). Section 204(l) can also apply in a case in which the petitioner died after approval, if USCIS, as a matter of discretion, reinstates a pre-death approval. Chapter 21.2(h)(1)(C) of the Adjudicator's Field Manual addresses the issue of cases in which the petition was approved prior to October 28, 2009. But section 204(l) applies to each type of case differently.

In a case involving a pending petition, the officer can address the applicability of 204(l) in the normal course of adjudication. The beneficiary can advise USCIS of the relative's death, and present evidence that the residence requirements are met. The officer can then determine whether any factors, as a matter of discretion, warrant denial of the petition on the ground that approval is not in the public interest. If the petitioner died after the petition was approved, the beneficiary must specifically request reinstatement of the approval. Otherwise, there would be no procedural base for determining whether 204(l) even applies, or whether there may be factors that warrant denial of relief under section 204(l) as a matter of discretion. . To request reinstatement of a revoked petition, the beneficiary should send a written request for reinstatement to the USCIS service center or field office that approved the petition except that, if the beneficiary has properly filed an application for adjustment of status with USCIS, the written request should be submitted to the USCIS office with jurisdiction over the adjustment application. The written request must include a copy of the approval notice for the revoked petition, the death certificate of the petitioner (or other qualifying relative) and, if required by section 213A of the Act and 8 CFR part 213a, a Form I-864 from a substitute sponsor and proof of the substitute sponsor's relationship to the beneficiary. The request should also provide evidence concerning where the beneficiary was residing when the qualifying relative died, and where the beneficiary is currently residing.

- e. Have field offices been provided any additional guidance on how to implement these changes and handle such cases?

**USCIS Response:** Guidance on this topic was provided in the December 16, 2010 memorandum entitled "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" and in Chapters 10.21 and 21.2 of the Adjudicator's Field Manual.

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<sup>10</sup> *AILA Comments on USCIS's Draft Memo Regarding INA Section 204(l)*, AILA Doc. No. 10060363, <http://www.aila.org/content/default.aspx?docid=32167>



## **NSEERS**

10. Now that the requirement of NSEERS registration has been effectively eliminated, what is the current instruction for adjustment of status cases that have been denied based on a determination by ICE that the applicant willfully failed to register? Can denied cases be reopened and adjudicated? What is the status of the guidance on NTA issuance?

**USCIS Response:** USCIS is in the process of drafting guidance to address this issue.

## **Change of Address**

11. Form AR-11, Change of Address does not allow electronic submission unless all fields are complete. However, in many cases, questions are not applicable to the applicant, but the form does not offer an “N/A” or “other” option. Could USCIS add these options to the form?

**USCIS Response:** Electronic submission of a Form AR-11 requires the following information:

- First Name
- Last Name
- Current Status
- Country of Citizenship
- Date of Birth
- Current Address
- Previous Address
- POE
- Date of Last Entry

USCIS does need all this information in order to process a change of address request, therefore, it would not be appropriate to respond with “N/A” or “Other.”

## **I-601 Waivers**

12. An application for adjustment of status with an I-601 waiver is denied by the local office. The applicant appeals the denial of the I-601 to the Administrative Appeals Office (AAO) and the AAO reverses the waiver denial.

- a. What is the procedure to seek reopening of the adjustment of status application at the local office? By the time the AAO grants the I-601 appeal, the 30-day time period for filing a motion to reopen under 8 CFR §103.5(a)(1)(i) has passed. In these situations, would USCIS consider reopening the adjustment of status application on its own motion as provided by 8 CFR §103.5(a)(5)(i)?

**USCIS Response:** Yes, USCIS would consider reopening the Form I-485, Application to Register Permanent Residence or Adjust Status, if the AAO grants the Form I-601 appeal,

assuming that the inadmissibility that the AAO waived was the only ground for the denial, and that USCIS still has jurisdiction to act on the Form I-485. If the individual is in a section 240 proceeding, jurisdiction may rest with the immigration judge. *Cf* 8 CFR 1245.2(a).

- b. If the Service will not reopen on its own motion, is the applicant required to pay the fee for a motion to reopen even though the AAO deemed the original denial improper?

**USCIS Response:** Not applicable, please see the response above.

13. During an adjustment of status interview, a USCIS officer may determine that an I-601 waiver is required in order to continue to adjudicate the matter. Some local offices issue a Notice of Intent to Deny (NOID), giving the applicant only 30 days to submit the I-601 and supporting documents. Other offices issue a Request for Evidence (RFE) and [permit 87 days](#) (84 days plus 3 days for mailing) to prepare and submit the waiver (AILA Doc. No. 11071334).<sup>11</sup> Where the officer determines an I-601 is required, would USCIS instruct local offices to issue an RFE rather than NOID and to permit 87 days to prepare and file the I-601 and supporting documentation? In contemplating this request, please consider the following:

- I-601 waivers are very document intensive. Cases must be thoroughly prepared to meet the heightened standard of exceptional and extremely unusual hardship.
- I-601 waivers often require a request for medical records which can take many weeks for a doctor's office to process, particularly where there are multiple doctors or medical issues involved. Medical record may be further delayed where the office stores its records off-site and employs a third party company to handle requests.
- Many applicants with admissibility issues seek attorney assistance only after they have received the waiver request at the adjustment of status interview. In these cases, it is extremely difficult, if not impossible, to prepare a well-documented case in less than 30 days.
- It is inconsistent to allow 87 days to submit a long-form birth certificate in responding to an RFE for an I-130 petition, but to give only 30 days to prepare and complete a document-intensive I-601 waiver. A 30-day response period effectively deprives the applicant of the right to present his or her case.

**USCIS Response:** USCIS issues written notices in the form of a request for evidence (RFE) to request missing initial or additional evidence from applicants or petitioners who filed for immigration benefits. A NOID may be issued if there is evidence of ineligibility or derogatory information known to USCIS that has not been disclosed to the applicant or petitioner. A NOID provides an applicant or petitioner with the opportunity to review and rebut the derogatory information. For this reason, it may be appropriate for an ISO to issue a NOID rather than an RFE when a waiver is required.

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<sup>11</sup> *USCIS Interim Memo on Changes to RFE Timeframes*, AILA Doc. No. 11071334, <http://www.aila.org/content/default.aspx?docid=36156>